UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

BON SECOURS CHARITY HEALTH SYSTEMS, WARWICK HEALTHCARE CAMPUS

Employer

and Case No. 2-RC-23303

1199 SEIU, UNITED HEALTHCARE WORKERS EAST Petitioner

Beth Moscarelli, Esq., Amy Ventry, Esq. and Robert Cirino, Esq., Nixon Peabody, LLP, Counsel for the Employer.

Ellen Dichner, Esq. and William Massey, Esq., Gladstein, Reif and Meginniss, Counsel for Petitioner.

DECISION ON CHALLENGES

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me in New York, New York on May 14, 15, 18, 19 and 20, 2009. Pursuant to a Stipulated Election Agreement entered into by the parties and approved on September 12, 2008, an election was conducted on October 30, 2008 in the following unit of employees:

INCLUDED: All full-time and regular part time, including per diem, non-professional service employees, including the following job titles: administrative assistant/secretary (facilities/engineering, nursing administration, medical lab, Physical Therapy Center); certified nursing assistant; central service aide; central service tech; communications clerk/receptionist/switchboard operator; clerk, health information management/data entry; clerk, med/surg; clerk, diagnostic imaging; clerk, admit/registration/medicare; clerk, admitting; clerk, Women's Imaging; cook; dietary aide; ER tech; graduate practical nurse; housekeeping aide; housekeeping/laundry; housekeeping/machine operator; nursing aide/assistant; OR aide; OR coordinator; pastoral care associate; patient transporter; personal care assistant; personal care assistant/med tech; perioperative/OR services coordinator; pharmacy tech; phlebotomist/EKG; physical therapy aide; prep cook; recreation/activities aide; recreational therapy aide; storeroom clerk; surgical service assistant; surgical tech; transporter/driver; unit assistant; and unit secretary, employed by the Employer at its Warwick Healthcare Campus.

EXCLUDED: All other employees, including business office clericals, skilled maintenance, confidential employees, guards, professional employees, and supervisors as defined in the Act.

The Tally of Ballots showed the following:

Approximate number of eligible voters	270
Void Ballots	
Votes Cast For Petitioner	121
Votes Cast Against Petitioner	118
•	230

Challenged Ballots	11
Valid Votes Counted Plus Challenged Ballots	
Challenges are sufficient to affect the results of the election. ¹	

Of the eleven challenged voters, the parties have stipulated and agreed that Ruth DeMouth worked a sufficient number of hours during the eligibility period, and that the challenge to her ballot should therefore be overruled and her ballot should be counted. The remaining employees were challenged because, while agreeing to a Stipulated Election Agreement, the parties could not agree to the inclusion or exclusion on these employees' job titles. The challenged voters are: Margarita Cortes and Pura ("Millie") Palma, Senior Housekeepers; the Petitioner alleges that they are ineligible as supervisors within the meaning of Section 2(11) of the Act, while the Employer defends that they are non-supervisory housekeepers and are eligible voters. Steven Forsyth, Michael Genese, Patrick Farrell, Michael Cippolla, and Carlos Gonzales are Maintenance Mechanics, and Daniel Scotto is Maintence Mechanic/Electrician: the Petitioner alleges that because of the nature of their work duties, they belong in a separate skilled maintenance unit, while the Employer alleges that they are not "skilled" and that they are therefore eligible voters in the service unit. The parties stipulated that all the maintenance mechanics perform the same work. Anita Hanley is Case Management Assistant or Case Management Secretary; the Petitioner alleges that she is a technical employee and does not share a community of interest with the other employees, while the Employer contends that she is an eligible voter. Diane Scott is Administrative Assistant/Secretary in Medical Records. The Petitioner alleges that she has no community of interest with the unit and is ineligible. The Employer alleges that the other employees in the medical records department, also called Health Information Management, were eligible, and so should she.

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The Warwick campus is basically composed of three buildings on the same campus, St. Anthony's Hospital, a full-service hospital, the Schervier Pavillion, which is a nursing home and rehabilitation facility, and Mt. Alverno, an adult home and assisted living facility.

30 Burden of Proof

As stated above, while agreeing to a Stipulated Election Agreement, the parties were unable to agree uoun the inclusion or exclusion of the maintenance mechanics, the senior housekeepers and the case management assistant and the administrative assistant/secretary in medical records, and they agreed the Board agent conducting the election would challenge these ten employees. At the hearing the issue arose as to which party had the burden of proof; the Petitioner to establish that they were not eligible or the Employer to establish that they were eligible? The answer is more obvious for Cortes and Palma as the Petitioner is alleging that they are not eligible because they are supervisors within the meaning of the Act, and Board law is clear that the party alleging supervisory status bears that burden of proof. The issue is not as obvious as regards Scott, Hanley and the maintenance mechanics as the parties could not agree on their inclusion or exclusion and the Board agent, at their direction, challenged their ballots. However, in two recent cases, Arbors at New Castle, 347 NLRB 544, 545-546 (2006) and Sweetener Supply Corporation, 349 NLRB 1122 (2007), the Board determined that it is the party seeking to establish the voters' ineligibility that bears the burden of proof, even when the Board agent challenged the ballots. I therefore find that it is the Petitioner that bears the burden of establishing the ineligibility of all the challenged ballots herein.

¹ Although the Petitioner filed timely objections to the election, pursuant to a motion by the Employer, I issued an order bifurcating the objections, which will be heard at a later date, if necessary.

Diane Scott

Scott is employed as correspondence secretary in the medical records department, a/k/a Health Information Management at the St. Anthony's facility. She has held that position for thirteen years. Prior to that she was employed by the Employer in data processing. She has a high school education and attended the Berkely School for a nine month intensive secretarial program in executive secretarial studies. She has no professional licenses or certifications, and the job requires none. She described her job as follows:

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I log in all the emergency room records for the hospital. I handle all the mail, correspondence of the hospital in our department. I do all the requests for records, release of information. That's pretty much my job.

She is trained to, and covers for other employees in the department, including the transcription 15 supervisor and medical records specialist, also called medical record clerks, and they cover for her when she is absent from work. The major part of her job is responding to requests for medical records from hospitals, other facilities, insurance companies, attorneys and doctors. In that regard, she has received training about HIPA. Upon receiving a subpoena she reads it to determine if it is a legitimate request, and if she determines that it is, she contacts the 20 department involved and obtains the information, usually from the X-Ray Department, the laboratory or physical therapy department and releases the information to the requesting party. If a requested document is incomplete, she will ask the doctor involved to complete the record. She usually obtains these documents by physically going to the department, on the average. about three times a day, in order to obtain patient's charts. She testified that she works in the 25 lower level of the hospital, which she described as a "classroom kind of setting where we are all in an open area. There are no partitions. We each have desks, no cubicle." She reports to Sandra Agny, the director of the medical records department, who has a separate office in the area. She interacts professionally with the medical records clerks several times a day, but does not report to anyone in the Employer's business office, which is located in an adjacent building. 30 The coders assign codes for diagnoses for hospital reimbursement. There is a coder in her

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coding and does not do any coding.

I find that the Petitioner has not sustained its burden that Scott is an ineligible voter and, on the contrary, I find that she shares a community of interest with the service employees, including the health information employees, rather than the business office employees. Scott, and the medical records employees share the same office and are supervised separately from the Employer's business office employees. She interacts regularly with the medical records clerks who are included in the unit and is cross-trained to, and covers for them during their absences. The billing office, on the other hand, is located in a separate building and there is only limited interaction between Scott and the employees in that office. I find that Scott is an eligible voter, and recommend that the challenge to her ballot be overruled, and that her ballot be opened and counted. *Marian Manor for the Aged and Infirm*, 333 NLRB 1084, 1096 (2001).

office, and other coders in a different, adjacent office, but Scott has received no training in

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Anita Hanley

Hanley has been employed by the Employer for three years as a case management assistant. She graduated from high school and acquired 47 credits in college. No professional certifications or licenses are required for the job, and she has none; further, she has not taken any specialized training in any medical related field. She described her job as follows:

I assist the case managers. Their job is to provide services after the patient gets discharged from the hospital. So, I assist them in helping to place that patient in a nursing home facility or in a rehab unit. Or, at times, they need a visiting nurse service after they are discharged, and I assist with that.

On about fifteen occasions a week, she assists the case manager by arranging for the transfer of a patient from the hospital to a skilled nursing care facility. She testified:

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The case manager would call me and tell me that they have a transport...and then she would mention the rehab center that they're going to. And I call the ambulance and set up the transport. Once I set that in place and I get a time, I call the facility and let them know the time that the patient will be arriving. And while I have the facility on the phone, I'll find out where exactly the patient is going; what floor or what room. And I find out the phone number where our nurse from St. Anthony can give the medical report to their nurse so that they know what's going on with that patient. And then I tell our case managers at the time. And that's when they notify the families as far as the time the patient will be leaving the facility.

Upon learning where the patient will be, she goes to the nursing unit, learns who the patient's nurse is, and gives her the information on where the patient is being transported to. On about ten times daily she goes to the medical surgery unit with the nurses and case managers in order to obtain charts and other information about patients to be transported. On occasion, when asked to do so by the case managers, she will speak directly to the families to notify them of the transportation arrangements. She also works with a doctor who handles claims that are denied by insurance companies. She will go the the medical records department and supply him with the patient's chart or copies thereof and he will review the information in order to get acceptance of the claim. She works in an office with Michelle Gregorio, her supervisor, and two case managers, both of whom are nurses. Hanley neither visits nor reports to the Employer's business office, although Gregorio reports to that office. She answers questions, and assists home care agencies that are inquiring about particular patients. She does not communicate directly with the patients, either in person or by phone; eighty to ninety percent of her time is interacting with the case managers.

Counsel for the Petitioner, in her brief, alleges that Hanley does not share a community of interest with the unit's service employees, and is therefore ineligible to vote herein. I disagree. A vast majority of Hanley's work time is spent arranging for the orderly transfer and transportation of the patients to a rehab or similar facility, as well as notifying the nurses and the patient's family of this information. She interacts on a regular basis (about ten times a day) with the medical records clerks and the unit secretaries, positions that are included in the unit herein. She works in close proximity to the HIM clerks and only spends about 10 to 20% of her time dealing with insurance companies on insurance refusal issues. I therefore find that the Petitioner has not sustained its burden of establishing that Hanley shares a community of interest with the business office employees; rather, I find that she shares a community interest with the medical records clerks and unit secretaries who are included in the unit herein, and that the challenge to her ballot should be overruled, and that her ballot be opened and counted.

Cortes and Palma

Cortes, Patrick Clark, George McCullough and Guy Weale testified regarding the

supervisory status of Cortes and Palma. Some of the facts herein are clear and undisputed. Prior to November 2007, Cortes held the title of supervisor of housekeeping at Mt. Alverno and Palma had the same position at Schervier. Not only did they have that title, but Cortes testified that their authority corresponded to their title. However, in November 2007, the Employer contracted with Aramark to provide management services for the housekeeping employees at the facility, including Mt. Alverno and Schervier, and, as part of the contract to provide these services, Aramark brought its personnel to the facility, including supervisors for the housekeeping department and, as a result, at that time, Cortes' and Palma's job title and status was changed to senior housekeeper.

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Clark, the director of human resources for the Employer, testified that in November 2007, the Employer contracted with an outside vendor, Aramark, to manage the housekeeping department. While the Employer's employees remained, Aramark brought in its own managers and supervisors for the department, and from that time forward, the Employer did not directly employ any supervisors in the department, and Cortes and Palma became senior housekeepers: "The supervisory authority they had for the employees went to Aramark. And they were returned back to the floors to do housekeeping work."

McCullough began his employment at the facility in July 2008 when he became employed by Aramark as operations manager at the Employer's facility. The job was to manage 20 the facility, including the housekeepers at the facility. He became employed directly by the Employer as housekeeping manager on about November 1, 2008 when Aramark's management contract with the Employer expired and was not renewed. At that time, he became involved with the Mt. Alverno and Schevier facilities; prior to that, he was only involved with managing the St. Anthony's facility, although he testified that neither Cortes nor Palma ever told him that their 25 responsibilities were any different when Aramark was managing the housekeeping department. He testified that since he became employed at the facility in July 2008, Cortes and Palma have been employed as senior housekeepers. Although he prepares the work schedules for the housekeepers, Cortes and Palma review the schedules with him, make sure the housekeepers are ready to go with their carts, perform whatever jobs McCullough gives them, and fill in for any 30 absent employee. Cortes and Palma act as floats for a majority of the time and neither one has a regular floor assignment, but when working, they perform the same work as the other housekeeping employees. Palma usually cleans the offices and lobby at Schervier, and assists in the dining room. Cortes cleans the lobby, the bathrooms and assists in the dining room at Mt. Alverno. If an employee wants to change shifts, he/she will either ask McCullough, or will ask 35 Cortes or Palma who will relay the request to McCullough. This occurred with Weale, who had asked Cortes to change his days off; Cortes told McCullough of Weale's request, and McCullogh met with Weale. Cortes had no role in deciding to change Weale's day off: "She just told me of his concern." Neither Cortes nor Palma can change the work schedules. He testified further that the housekeepers at the facility have basically the same skills, and that there are no 40

differences between the jobs of Cortes and Palma. If there is a spill, or something else needs to be done: "I speak to Mille or Margarita and I let them handle it as far as getting it done." Housekeepers usually have the same assignments every day, but for most new assignments, he makes the decision as to who will be assigned the job, after discussing it with Cortes and Palma. He and Tom Mattice, the director of housekeeping, decide on who to interview, hire, or discipline; Cortes and Palma have no such authority. If they say that they are having a problem with a housekeeping employee, McCullough would investigate the situation and meet with the employee. That happened with Weale. Cortes told him that Weale was complaining about other employees not performing their work, which impacted on his job. As a result, McCullough arranged a meeting with Weale and the other employees to straighten out the situation. If one of

the housekeepers in Mt. Alverno or Schervier does not appear for work, Cortes or Palma would call McCullough who tells them that they should fill in for the missing employee. Cortes and

Palma have no authority to call someone else in to fill in for a missing employee and have no authority to approve overtime work, only he can do that. Cortes and Palma train new employees on the correct way of maintaining patients' areas, corridors, bathrooms and the nurses' stations. Neither Cortes nor Palma have the authority to grant time off or vacation time. They notify McCullough of the employee's request, and he makes the decision. Cortes, Palma and the other housekeepers punch a time clock; McCullough does not. Each facility has rounds once a week with the administrator, nurse manager, and someone from infection control. If McCullough is not available, Cortes or Palma will cover for him on rounds. Cortes and Palma notify him of any problem with the housekeeping employees: "They're kind of my ears and eyes for the facilities. And I communicate with them, again, every single day." Cortes and Palma earn about \$4 to \$6 an hour more than the other housekeeping employees.

Cortes testified that she was initially employed by the Employer in 1999 as a housekeeper, and in 2000 she became a CNA. Within a year, she was offered a position as a supervisor of housekeepers and maintained that position until November 2007, when Aramark obtained the contract at the facility to supervise the housekeeping department. About a month earlier, Tom Brunell, a representative of the Employer, told her, Palma and "Ann", the senior housekeeper at St. Anthony's, that as Aramark would be managing the housekeeping department, they would be demoted to senior housekeepers. He said that Aramark would "run the show," that they would be expected to help Aramark at first, and that their pay would remain the same. About a week later, Brunell assembled the housekeeping staff, and told them the same thing. After that, rather than being the supervisor at the Mt. Alverno facility, she was the senior housekeeper at the facility, and "Michelle" and Kevin Clark were the Aramark supervisors. Prior to November 2007, she hired employees, did the schedules, wrote up, disciplined and evaluated employees. After November she no longer had this authority; she could not hire, schedule employees, select employees for hire, vacations, or discipline employees. Aramark supervisors did that. In addition, if housekeeping employees did something wrong, or took too many breaks, Cortes would not do anything about it. If she saw that a housekeeping employee was using a wrong product, or using it improperly, however, she would show her the proper way to use it: "But, that's about it." If a floor employee called Cortes, rather than the Aramark supervisor, that there was a spill on the floor: "I would get my cart and mop it up or something like that." On other occasions she would tell whichever housekeeping employee was assigned to that floor to please clean up the spill, or if she was covering that floor, she would clean up the spill. If a housekeeping employee at Mt. Alverno was going to be absent, "we would split the floor." If there were extra cleaning projects to be performed at Mt. Alverno, and they were fully staffed, Michelle would assign her to do projects.

Marilyn Ciora regularly works on the fourth floor at Mt. Alverno, Debbie Esposito works the third floor, Kathy Carr works the second floor, and Rosemary Dudlo regularly works the first floor. Since all the areas are covered, if everybody is at work, Cortes has projects or special cleaning assignments to perform, such as carpet cleaning or the garbage rooms. In addition, she spends about a half hour twice a week in the office ordering cleaning supplies. She estimated that she spends about 60% of her time covering for other housekeeping employees. On occasion, if someone from Schervier is absent, she would work there as well.

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Weale, who has been employed at the facility, principally Schervier, as a per diem employee since June 2008, testified that Palma was his supervisor at Schervier, and Cortes was the supervisor at Mt. Alverno. He did not have a regular daily assignment, and Palma would tell him what to do for the day. On occasion, a nurse asked him to do something, and he did it without first checking with Palma. If there were emergency situations, such as a toilet overflow, she would transfer him from one job to another. If there were complaints about his work, she would tell him about them. On one occasion in about December 2008, Palma told him that

Cortes wanted him to be disciplined for taking an unauthorized cigarette break, but she was not going to do it. When he wanted to take time off from work, he asked Palma. Most of the time, she gave him an immediate answer. On occasion, she said that she first had to make a phone call. On the occasions when he asked Palma to leave work early, she always gave him permission to do so without calling anybody. If he had a problem at work after Palma left, she instructed him to call her at home. He identified a housekeeping work schedule in October 2008 that contained the word "SUPVSR" next to Palma's name, as well as an Employer newsletter dated August 2008 that contained an article about Cortes and listed her current job as housekeeping supervisor.

Initially, I note that I found Cortes to be a totally credible and believable witness, and credit her testimony in its entirety. That is not to say that I found Weale to be an incredible witness, but after observing the witnesses and rereading their testimony, I credit Cortes' testimony. Further, I found her testimony not only credible, but reasonable. Considering the number of housekeeping employees, and the repetitive nature of the work, it is not unreasonable to conclude that one individual, together with the experienced senior housekeepers, rather than three or four, can "supervise" the housekeeping employees. I therefore find that when Aramark took over management of the Employer's housekeeping department, Cortes and Palma went from "supervisors" to "senior housekeepers," as the button they wear states. I further find that with the exception of going on rounds, discussing the schedule with McCullough, and ordering supplies, the work they perform is essentially filling in for absent housekeepers, or doing special projects, in other words, generally the same work as the other housekeepers, although their salaries are higher.

The sole evidence of any supervisory authority on the part of Cortes and Palma is that, on occasion, they tell the housekeeping employees to perform some job, such as cleaning up a spill, or will correct an employee who is performing the job in an incorrect manner. However, this type of direction does not satisfy the requirements of Section 2(11) of the Act. Recent case law requires not only that individuals alleged to be supervisors have the authority to engage in any of the activities enumerated in Section 2(11), but that the exercise of that authority is not merely routine, but requires the use of independent judgment and, in addition, that the authority is held and exercised "... in the interest of the employer." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006), citing *NLRB v. Kentucky River County Care*, 532 U.S. 706, 713 (2006). While they may have been supervisors within the meaning of the Act prior to November 2007, I find that the Petitioner has not satisfied its burden that they possessed supervisory authority for the subsequent period, and I therefore recommend that the challenge to their ballots be overruled and that their ballots be opened and counted.

Steven Forsyth, Michael Genese, Patrick Farrell, Michael Cippolla, Carlos Gonzales, and Daniel Scott

These employees are the maintenance mechanics employed by the Employer; Scotto's job title is maintenance mechanic/electrician. The Petitioner alleges that they belong in a separate skilled maintenance unit; the Employer alleges that they have a community of interest, and belong in the same unit with the other service employees at the facility. Hector Sanchez has been employed as a maintenance mechanic at the St. Anthony facility since 2002. He is presently employed on the 7 a.m. to 3 p.m. shift. Prior to his present employment, he was employed from 1991 to 2001 at a food court, starting as a maintenance employee and eventually becoming a supervisor. Prior to that, he was employed for nine years by a plumbing company, initially as a junior mechanic and then a skilled mechanic, installing gas lines, drainage systems and toilets. He has no licenses or certifications, and no formal training in electrical or plumbing work, but while employed by the Employer, he attended a five hour

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training course in the operation of oil burners. Steven Ovens, who has a number of certifications, is employed by the Employer as a facilities supervisor of the maintenance department at St. Anthony's. Louis Bender, the HVAC technician, is the only employee in his department who is certified; he earns \$28 an hour. Ovens supervises Forsythe, Farrell, Sanchez and Genese. George Tiedemann, who has been employed as the maintenance supervisor by the Employer for twenty five years at Mt. Alverno and Schevier, supervises Scotto, Cipolla and Gonzales.

Sanchez' performance evaluation states that a maintenance mechanic performs "...a variety of tasks including but not limited to the following, basic electrical work, carpentry, plumbing and steam fitting. The operation and maintenance of boilers as well as the repair and maintenance of hospital equipment." He testified that he does rounds on a daily basis, checking temperature readings, boiler readings, steam, pressure and negative air pressure readings. It takes about an hour each day, during the morning. There are three boilers, and he checks them for steam and pressure and checks the guages to be sure that the hot water service is operating properly. He opens up the valve to let the steam out in order to "blow down the boiler." This has to be done three times each day. He has to check the air quality readings, vacuum pumps as well as the air conditioning system. He goes up on the roof to be sure that the units are working. If he hears that a fan belt is broken, he tells his supervisor and then either of them will replace the fan belt. On an occasion last Winter the gas boiler was not working on his shift; he had to "troubleshoot" the boiler and get it started. There is a circulating pump at St. Anthonys that circulates the water through the pump and the tank; he has had to repair this pump when it was leaking. In February 2008 he installed steam traps with Sal Mangalussi, the plumber at the facility, by cutting the drain pipe and installing the trap. The job took the two of them about three hours. He has also changed belts and motors on the air conditioning system with Bender. He has also changed a compensation pump in the boiler room with the assistance of Preis. Sanchez removed the old pump and after Preis disconnected the electrical connections, he installed the new pump with bolts and threaded pipes, and Preis completed the job by connecting the electrical lines to the pump. On another occasion, he worked with Preis, to repair the medical vacuum system.

Sanchez has performed work in other areas as well. He has connected ballasts for fluorescent lights, requiring removing the ballasts, testing it and reassembling it. He has performed plumbing work, repairing toilets that were leaking, and reconnected the toilet to the floor. He has also installed sinks and has employed an electrical snake to unclog sinks and toilets. Early in 2009 he installed wall cabinets and countertops in the recovery room of St. Anthonys; he measured the area involved and installed the countertops when they were delivered. He also measured and installed cabinets and countertops for the nurses' lounge in the ICU. He has worked with Mangalussi on a difficult plumbing job in the recovery room that involved exposing the wall, performing some drain work, and then repairing the wall, which work was performed by Sanchez, by sheetrocking the wall, which is something that he is accustomed to doing, along with painting. In 2008 he installed handrails along a corridor for people with physical disabilities. He has hung and replaced soap dispensers and paper towel dispensers. He installed a x-ray board with fluorescent lights offsite for the use of the doctors to be able to read x-rays. He testified that in the performance of the above described work he uses all sorts of tools- jigsaws, circular saws, drills, hilti, an electrical tool to make holes in concrete, levellers, wrenches, hammers, files, screwdrivers, guages and meters.

In addition to the above, Sanchez, and the other maintenance employees also perform more "mundane" everyday jobs, such as carrying oxegyn tanks and water bottles to certain floors of the hospital, removing trapezes from hospital beds, installing and securing room air conditioners, doing "building rounds" to check on the security of the building, and opening the

gift shop located in the hospital. When Sanchez worked the 11 p.m. to 7 a.m. shift, he spent the last hour sitting at the front desk until the receptionist arrived.

Ovens testified that the work of the maintenance mechanics "runs the gamut". He testified:

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They can do bed transports, moving furniture, wall repair, some painting, touch up type painting, occasionally something a little bit more than that, but not often, delivery O2, open up the gift shop, the building rounds, taking readings of the equipment and different heating systems, temperature readings, steam pressures.

Whoever is employed on the overnight shift, covers the front desk at the hospital from 6 a.m. to 7 a.m. He testified that the maintenance mechanics have "limited responsibility" for maintaining the heating, air conditioning and hot water systems at the facility. He described rounds performed by the maintenance mechanics:

The rounds we do at the start of each shift involves taking readings in numerous areas in the hospital on levels of our main O2 storage tanks to steam pressures, hot water heating temperatures, the vacuum pressure, our compressed air system pressure, the boiler steam pressures. It's taken in several different areas, not only of boilers, but also in one of the other mechanical rooms. Because we do have three different hot water loop systems in the building. We record temperatures for each of them.

The maintenance mechanic then records the temperature on the engineering log sheet. He testified that no special skill is required in taking these readings, only knowing where the meters are. Occasionally, the maintenance mechanic might have to "blow the boiler down." He testified that all that is involved in that is "opening and closing a couple of valves." Based upon his observation of Forsyth's daily log sheets for March 2008, Oven's estimated that the percentage of time that he was engaged in tasks, or assisted in tasks, that required some sort of skill in the trade was between 5% and 10%. The remaining portion of their time was performing "mundane" tasks, such as: "Everyday tasks that we end up doing to meet the needs of the hospital. From transport, 02, to making wall repairs, touch up painting, assisting the electrician or possibly assisting the plumber if he needs help with a project. Or the HVAC mechanic." He further testified that "major electrical issues" and some HVAC issues are not handled in-house, rather they are contracted out to outside companies. When asked how he determines whether to have a maintenance mechanic repair a unit, or to call in an outside contractor, he testified: "The first question, what's the nature of the problem? Is it a life safety issue? Is it a true emergency or an inconvenience in that we have two other boilers down there..."

Oven testified to a situation where the vacuum pump at the hospital malfunctioned and he, Preis and Farrell worked together to repair it. On other occasions when it malfunctioned, Oven, Preis and a maintenance mechanic worked to repair it. The facility has condensate pumps that return condensated steam when it returns to water to the condensate tank in the boiler room and then it is used to refeed the boilers. On one occasion in 2007 or 2008, Sanchez repaired a condensate pump on his own. Oven completes job performance evaluations for the maintenance mechanics who work under his supervision. One aspect of the evaluation states that the employee repairs various equipment, beds, doors, lights, plumbing, fixtures, etc. He was asked if the maintenance employees do that specified work; he testified: "All those functions to varying degrees." The next entry is "Operates boilers and HVAC equipment." He answered that they all do it, "To their abilities." In addition, they do painting, patching walls and sheetrocking work, as well as plumbing work repairing inoperative toilets and sinks. They build shelves and install cabinets, fix doors, door locks, replace doors, replace ceiling and floor tiles.

Tiedemann testified that his job is to "maintain the building, make sure there's heat, hot water, air conditioning. Make the building comfortable for everybody else. Any repairs that have to be done, we'd take care of them." He supervises Scotto, Cipolla and Gonzales: "I dictate their daily chores and tasks, make sure that's completed." None of the three have a license or certification. He believes that a high school diploma is required for the job. The employees start at seven; he arrives at eight o'clock. The first thing they do is check the boiler room and water softeners. They deliver the oxygen to the nursing units and then he gives them their assignments which could be "...anything from ceiling tiles to floor tiles to towel racks in the bathroom. It could also be snow removal during the Winter." They move furniture, set up rooms for meetings, and move residents' belongings. The Employer uses outside contractors for major boiler work, air conditioning work, and large electrical jobs. They do "minor" carpentry work such as shelving and his men have painted residents' rooms. Painting of the hallways was done by an outside contractor, because it would have taken too long for his employees to do it. "And it would tie us up and we wouldn't be able to do the other work." Tiedemann was shown the daily time sheets for Scotto, Cipolla and Gonzales for the first week of March, May, July and September 2008 and was asked if any of the job duties listed on the work sheets required some sort of specialized skill in the trades, electrical, plumbing, HVAC or carpentry. He responded that only one work order would have required such skill, when one of the employees replaced a ballast in a fluorescent light. He also estimated that the percentage of time that Gonzales and Cipolla engage in tasks that require specialized skill in electrical work, plumbing, HVAC, refrigeration or carpentry is less than two percent.

Tiedemann and his maintenance mechanics are sometimes asked to partition rooms to smaller rooms. In these situations, they measure the area, divide the area, and install drywall in the rooms. They also repair floors, remove old floor tiles and install new floor tiles. They perform plumbing work as well, replacing sinks, fixing leaking faucets, and clearing sewer lines. They also install and replace one piece shower units, which sometimes requires an adjustment, as the new shower might not be the same size as the existing shower unit. Sometimes the showers leak, and the maintenance men have to remove the old tile and install new tile. The maintenance mechanics' pay rate is higer than the housekeepers. As an example, Farrell and Forsyth, hired in 2000, were paid between \$20 and \$21 an hour. Housekeeping employees hired at about that time, were paid \$12 an hour.

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I find that the Petitioner has sustained its burden of establishing that the maintenance employees herein belong in a separate skilled maintenance unit. As stated by counsel for the Petitioner in her Brief, the Board, at 284 NLRB 1527 (1984) set forth its Second Notice of Proposed Rulemaking, with an extensive discussion of units in hospitals, including skilled maintenance units. In its descussion, at p. 1561, the Board stated:

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In virtually all health care facilities which were the subject of testimony at the hearings, skilled maintenance employees constitute a discrete and distinct group of employees. They perform functions apart from those of unskilled service, maintenance and clerical employees. Skilled maintenance employees were shown to be highly skilled, as evidenced by higher education, licensing, and training requirements. While they share some common terms and conditions of employment with other hospital personnel, these employees uniformly have higher wages than service and clerical employees and have a number of bargaining interests separate and distinct from those of non-maintenance employees, such as access to craft related education and training programs, tool supply allowances, safetey equipment and practices, portable pensions and the like. Moreover, while skilled maintenance employees do work throughout the entire hospital, their contact with non-maintenance employees is brief and limited...For the above reasons,

we find that a unit of skilled maintenance employees is separately appropriate for collective bargaining purposes. Although the number of employees in such a unit will be relatively small, their work bears little relationship to that of other hospital employees. It is, essentially, a non-health care occupation involving skills, interests and job markets largely separate from the hospital itself. For that reason, to require unions to organize and represent skilled maintenance employees as part of a larger group of unskilled employees performing health related jobs within the hospital is both unrealistic and inefficient. Hence, we have decided that the final rule should provide for separate skilled maintenance units.

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The Board also stated (at p. 1562): "As noted above, sometimes relatively unskilled utility workers are included, either if they are involved in the maintenance, repair and operation of hospitals physical plant system, or if they are part of a separate maintence department." In *Park Manor Care Center*, 305 NLRB 872 (1991), the Board determined how these appropriate bargaining units would be decided in nonacute health care facilities. *McLean Hospital Corporation*, 309 NLRB 564 (1992) discussed several factors present in skilled maintenance units: higher levels of skill than is usually present in the service unit; separate supervision, higher rates of pay, and little or no interchange with the service employees. Further warranting separate representation, the maintenance employees herein, unlike the service employees, have little or no patient care responsibilities. *Jewish Hospital of St. Louis*, 305 NLRB 955 (1991). *Hebrew Home & Hospital, Inc.*, 311 NLRB 1400, 1403 (1993), states:

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Moreover, the petitioned for employees possess specialized skills acquired either through education, work experience or on the job training, which are different in nature than those possessed by the Employer's other employees. Thus, contrary to the Employer's contention, the fact that most or all of the maintenance mechanics lack any formal training or licenses does not preclude their inclusion in a separate skilled maintenance unit so long as they actually perform skilled maintenance work, fill the position of a trainee, or serve as helpers or assistants to skilled maintenance employees in the performance of their work...

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In *Silver Cross Hospital*, 350 NLRB 114, 116 (2007), the Board stated that in determining the appropriateness of skilled maintenance units, "...the Board looks to whether the disputed employees possess the types of skills, and are required to perform, at similar skill levels, the kinds of job duties common to other skilled maintenance classifications, or whether the disputed employees are helpers or assistants to other employees included in the skilled maintenance unit. Moreover, another factor that is relevant to a skilled maintenance analysis is whether the disputed employees actually perform work on the hospital's physical plant."

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Although the employees in question here are not *the most* skilled employees, and have neither licenses nor certifications, that is not required by the Board. They perform work that requires a high degree of skill, they are separately supervised, earn a substantially higher rate of pay than the other service employees, and they do not engage in any direct patient care. I therefore find that the maintenance mechanics and the maintenance mechanic/electrician belong in a separate unit of skilled maintenance mechanics, and I therefore recommend that the challenge their ballots be sustained.

Conclusions

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Based upon the above, I recommend that the challenges to the ballots of Hanley, Scott, Cortes and Palma be overruled and that their ballots be opened and counted. I also recommend that the challenge to the ballots of Forsyth, Genese, Farrell, Cipolla, Gonzales and Scott be

sustained, and that these ballots not be opened and counted. If, after these ballots, together with the ballot of DeMouth, are opened and counted, the Petitioner has obtained a majority of the valid votes counted, the Regional Director shall issue an appropriate certification.² If, after counting the ballots of DeMouth, Hanley, Scott, Cortes and Palma, the Petitioner has not obtained a majority of the valid votes counted, the region shall then hold a hearing and make a determination on the validity of the Petitioner's objections.

Dated, Washington, D.C., September 9, 2009.

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Joel P. Biblowitz Administrative Law Judge

Under the provision of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and Recommendations. Exceptions must be received by the Board in Washington by